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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

No. 79-939

DELAWARE STATE COLLEGE, et al.,

Petitioners,

v.

COLUMBUS B. RICKS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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INDEX

	Page
RESTATEMENT OF THE CASE	2

CITATIONS

Abramson v. University of Hawaii, 594 F.2d 202 (9th Cir. 1979)	7, 8, 15
Bernard v. Gulf Oil Company, 596 F.2d 1249 (5th Cir. 1979)	18, 19
Bracamontes v. Amstar Corporation, 576 F.2d 61 (5th Cir. 1979)	10, 12
Commissioner v. Estate of Bosch, 387 U.S. 456 (1967)	14
Dickinson v. Petroleum Corp., 338 U.S. 507 (1950)	14
Egelston v. State College at Genesco, 535 F.2d 752 (2nd Cir. 1976)	15
Farris v. Board of Education of St. Louis, 576 F.2d 765 (8th Cir. 1978)	10, 12
Friend v. Leidinger, 588 F.2d 61 (4th Cir. 1978)	11, 12
Gillespie v. U.S. Steel Corp., 379 U.S. 148 (1964)	6
Henderson v. Kibbe, 431 U.S. 145 (1977)	17

John Hancock Ins. Co. v. Bartels,
308 U.S. 180 (1939) 14

Kurlyas v. U.S. Department of
Agriculture,
514 F.2d 894 (D.C. Cir. 1975) 21

Land v. Dollar,
330 U.S. 731 (1947) 6

Larson v. Domestic & Foreign Corp.,
337 U.S. 682 (1949) 6

Manzanares v. Safeway Stores, Inc.,
593 F.2d 968 (10th Cir. 1979) 21

Martin v. Georgia-Pacific Corp.,
568 F.2d 58 (5th Cir. 1977) 13

Masco v. United Airlines,
574 F.2d 1127 (3rd Cir. 1978) 10, 14

Meyers v. Pennypack Woods Home
and Ownership Association,
559 F.2d 1127 (3rd Cir. 1978) 14

Noble v. University of Rochester,
535 F.2d 756 (2nd Cir. 1976) 15

Smith v. American President Lines,
Ltd.,
571 F.2d 102, 105 (1978) 15

United Air Lines, Inc. v. Evans,
431 U.S. 553 (1977) 5, 11,
12, 13,
15, 16

United States v. General Motors
Corp.,
323 U.S. 373 (1945) 6

United States v. Kuberick,
48 U.S.L.W. 4030 (11-27-79) 19, 20

42 U.S.C. §1981 6

42 U.S.C. §2000e-5(e) 6, 9

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RESTATEMENT OF THE CASE

The contractual employment relationship between Delware State College, a predominantly black educational institution located in Dover, Delaware, and the Respondent, Columbus B. Ricks, was composed of written one academic year contracts, i.e., each contract began in September of a school year and concluded in June of that same school year. Thus, Respondent was not employed from 1970 to 1975 continuously as represented in Respondent's Brief at p. 3.

When Respondent was denied tenure in March of 1974 by the Board of Trustees of Delaware State College, he was under contract for the term of September 1, 1973 through June 30, 1974. Thus, neither party had any contractual obligation to

the other Petitioner subsequent to June 30, 1974.

As a result of the Respondent being denied tenure, and in accordance with the College's established policies, Respondent was offered a "terminal year" contract which would run from September 1, 1974 through June 30, 1975. Respondent was under no legal obligation to accept or perform services for this contractual period. However, on September 3, 1974 he agreed to accept this "terminal year" contract. Respondent was permitted to fully perform this contractual agreement.

Further, there are no formal or informal procedures to reconsider tenure decisions other than those already identified in the Petition. Specifically, no such procedures exist during the "terminal year" contract period.

Moreover, there are no allegations that such formal or informal procedures for reconsideration of tenure decisions existed at Delaware State College and were discriminatorily denied to Respondent by Petitioners.

REASONS FOR GRANTING THE WRIT

THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT WARRANTS THIS COURT'S IMMEDIATE REVIEW

Respondent asserts that this Court has held that it can only review final orders of the Courts of Appeals, and he further asserts that this is the law in matters pertaining to such fundamental issues as the existence of the requisite jurisdiction of a Federal Court to determine a claim.* As evidenced

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*Respondent's Brief at pp. 4, 5.

by a long line of decisions by this Court, Respondent's contention is totally without merit.

In particular, the decision of this Court that is at the core of this Petition, United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977) established clear recent precedent for this Court to grant certiorari in the present matter. The procedural history of Evans involved a dismissal of the complaint pursuant to Rule 12(b) in the District Court. The Court of Appeals reversed and remanded the matter for trial, and this Court granted certiorari to review the Court of Appeals decision to remand the matter. Procedurally, Evans is identical to the present matter.

In numerous cases, this Court has determined that where the petitions

involved fundamental questions affecting the further conduct of the case, it was most appropriate for this Court to grant certiorari to review the lower court decisions. Larson v. Domestic & Foreign Corp., 337 U.S. 682 (1949); United States v. General Motors Corp., 323 U.S. 373 (1945); Gillespie v. U.S. Steel Corp., 379 U.S. 148 (1964); and Land v. Dollar, 330 U.S. 731 (1947). Clearly, on the basis of the above authority, the fundamental issue pertaining to Respondent's compliance with the jurisdictional time limitations for asserting claims under 42 U.S.C. §§1981 and 2000e warrants this Court granting certiorari in this matter.

THE CONFLICT BETWEEN THE COURTS OF APPEALS INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW REQUIRING A UNIFORM RULE.

Respondent asserts that the holding of the Ninth Circuit in Abramson v. University of Hawaii, 594 F.2d 202 (9th Cir. 1979) does not conflict with the holding of the Third Circuit in the present matter. Respondent supports the assertion by noting that both decisions involved remands to the trial courts. Such a claim fails to consider the actual holdings of the Courts, and attempts to obfuscate the direct conflict of the holdings. Respondent's contention is plainly a meritless attempt to assert form over substance which should be disregarded and rejected by this Court.

The Third Circuit specifically held that though the tenure denial was made on or before June of 1974, the 180 day period applicable to the Respondent's alleged unlawful employment practice did not begin

to run until the one year "terminal" contract expired on June 30, 1975, Petitioners' Appendix at pp. 5-A, 12-A, 13-A. The Ninth Circuit in Abramson specifically rejected the contention that the denial of tenure occurred at the time that the "terminal year" contract expired, see Abramson at page 209. Moreover, the Ninth Circuit required the Plaintiff to show some action regarding the tenure process that occurred within the requisite time period other than the expiration of the "terminal year" contract.

In Abramson, the Court remanded the case to the District Court for the purpose of determining whether that Plaintiff could substantiate her allegations that additional reconsideration procedures existed and were discriminatorily denied her at times that would bring such sub-

sequent acts within the application of Title VII. However, such a limited remand does not eliminate the conflict, since Respondent admits that there are no discriminatory actions alleged against any of the Petitioners in the present matter which occurred within 180 days of the date on which Respondent filed his complaint with the Equal Employment Opportunities Commission*, see Petitioners' Appendix page 28a. Thus, it is abundantly clear that the decisions of the Ninth and Third Circuits concerning the application of the requirements of 42 U.S.C. §2000e-5(e) as

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*Respondent filed his complaint with the Equal Emploment Opportunities Commission (EEOC) on April 4, 1975. No allegations of discriminatory acts occurring between October 7, 1974 and the filing date exist. The date relied upon by the Third Circuit was June 30, 1975, which was almost three months subsequent to the date of filing. No amendment to the initial filing was ever made by Respondent.

applied to tenure decisions are squarely in conflict with one another. Certainly, the application of the time limitation requirements of 42 U.S.C. §2000e-5(e) is an important question of federal law and a recurring matter that requires a uniform rule among the Circuit Courts.

Respondent asserts that the holdings of the Fifth Circuit in Bracamontes v. Amstar Corporation, 576 F.2d 61 (5th Cir. 1979) and the Eighth Circuit in Farris v. Board of Education of St. Louis, 576 F.2d 765 (8th Cir. 1978) are not in conflict with the holding in the present matter because a prior decision of the Third Circuit is consistent with their holdings, Masco v. United Airlines, 574 F.2d 1127 (3rd Cir. 1978). Such an assertion clearly misses the mark. The issue is not whether the Third Circuit has

decided other cases consistently with the other Courts of Appeals, but whether it has decided the present matter in a consistent manner with the holdings of the other Courts of Appeals. When this comparison is made, it is clear that the present holding conflicts with the decisions of the Fifth and Eighth Circuits, as noted above, and with the Fourth Circuit decision in Friend v. Leidinger, 588 F.2d 61 (4th Cir. 1978).

The holding in the present matter states that it is not bound by United Air Lines v. Evans, 431 U.S. 553 (1977) on the basis that Evans only applied to situations where there was an actual termination followed by some subsequent action. However, the other Circuits have applied the holding of Evans in situations that did not involve actual

terminations. In Farris, the Court applied the rule of Evans to a situation where there was no termination, but involved the claim of loss of seniority. In Bracamontes the Court was concerned with alleged discriminatory refusals to rehire the claimants. There were no allegations that the actual termination constituted the underlying discriminatory act for these charges. Additionally, in Friend, the Court applied the 180 day filing requirement to employees who were presently employed which is in clear conflict with the rationale offered by the Third Circuit in the present matter. The Fourth Circuit in Friend specifically relied upon the holding of Evans. For instance, promotional tests which were not made the basis of a complaint within 180 days of their occurrence were considered

time barred. Thus, this clearly conflicts with the Third Circuit's determination that Evans only applies to situations involving actual terminations.

Finally, Martin v. Georgia-Pacific Corp., 568 F.2d 58 (5th Cir. 1977) also held that United Air Lines v. Evans, supra., applied to employment discrimination other than termination situations. Respondent argues that Martin is distinguishable from the present matter because the facts in Martin indicated that there were no continuing discriminatory acts, and no acts which occurred within 180 days of the filing. As already noted, Respondent has conceded the same regarding the 180 days prior to his filing. Therefore, there is a direct conflict between the Third Circuit holding in this case and that of the Fifth Circuit in Martin.

Respondent maintains that prior Third Circuit decisions, Meyers v. Pennypack Woods Home and Ownership Association, 559 F.2d 1127 (3rd Cir. 1978) and Masco v. United Airlines, supra, which are or may be inconsistent with the present matter do not constitute a sufficient basis for this Court to review the present case. Clearly, in light of the conflict among the circuits, this additional intra-circuit conflict does constitute a significant ground for this Court to grant certiorari, Commissioner v. Estate of Bosch., 387 U.S. 456 (1967); John Hancock Ins. Co. v. Bartels, 308 U.S. 180 (1939); Dickinson v. Petroleum Corp., 338 U.S. 507 (1950).

Respondent further maintains that this Court should not grant certiorari in this matter because the Second Circuit has

decided two cases in a similar fashion to the present matter, Egelston v. State College at Genesco, 535 F.2d 752 (2nd Cir. 1976) and Noble v. University of Rochester, 535 F.2d 756 (2nd Cir. 1976). Clearly, these cases simply exasperate the already existing conflict between the Circuits. For instance, the Ninth Circuit in Abramson v. University of Hawaii, supra, specifically refused to follow the rationale of Egelston. Of even greater significance, however, is the fact that both of these cases were decided prior to this Court's decision in United Air Lines v. Evans, supra. Subsequent to this Court's decision in Evans, the Second Circuit narrowly construed and refused to apply either of these cases, where the application of 42 U.S.C. §2000e-5(e) was at issue, Smith v. American President Lines, Ltd., 571 F.2d 102, 105 (1978).

THE COURT OF APPEALS DECISION IN THIS MATTER CLEARLY FAILS TO APPLY THE RULE OF UNITED AIR LINES, INC. V. EVANS.

Respondent maintains that the Third Circuit was not bound by this Court's ruling in United Air Lines v. Evans, supra., because the Third Circuit found "a continuing violation" in the present matter. This finding totally disregards the holding of this Court in Evans. It is precisely the resurrection of the discredited "continuing violation" concept that places the present case at odds with Evans. Clearly, such a conflict warrants this Court granting certiorari to review this matter. In fact, on this basis alone, Petitioners believe summary reversal of the Third Circuit is appropriate.

Recent precedent concerning Court of Appeal conflicts with holdings of this

Court, also clearly supports the granting of certiorari, Henderson v. Kibbe, 431 U.S. 145 (1977).

THE HOLDING OF THE THIRD CIRCUIT, CONCERNING WHEN A CAUSE OF ACTION ACCRUES FOR PURPOSES OF ASSERTING A 42 U.S.C. §1981 ACTION, CLEARLY CONFLICTS WITH THIS COURT'S PRIOR DECISIONS AND WITH OTHER COURTS OF APPEALS DECISIONS.

Neither the Third Circuit nor the Respondent has offered any legal basis for determining that a denial of tenure which was complete and made known to the Respondent not later than June of 1974 should be treated as not accruing until the Respondent fully performed his last employment contract with the Petitioner College. It should be noted that there are no allegations claiming the procedures for offering terminal year contracts to persons not receiving tenure status were applied in a discriminatory manner to

Respondent. Moreover, the terminal year of contractual relationship was fully performed by both parties. There are no discriminatory allegations concerning the performance of this contract. Thus, on the basis of the above facts, the injury or harm complained of occurred when the Respondent was denied tenure. When Respondent was aware of this denial, he had a right, at that time, to seek legal redress for that decision.

The Fifth Circuit held in Bernard v. Gulf Oil Company, 596 F.2d 1249 (Fifth Circuit 1979), that the statute of limitations began to run on the last date when a party is improperly harmed. The Court further held that the statute applies to new actions when new and distinct activities are alleged. However, as already indicated, in the present case

there are no new and distinct actions alleged to be discriminatory beyond the time that tenure was denied Respondent. Thus, the Third Circuit's holding is in direct conflict with the Fifth Circuit's holding in Bernard.

Additionally, this Court's holding in United States v. Kuberick, 48 U.S.L.W. 4030 (11-27-79) involved a situation applying the most liberal standards for determining when a cause of action accrues. This Court held that a cause of action accrues when the injury occurs and certainly not later then when the injured person is aware of its probable cause. Clearly, as of June 1974, Respondent was aware of the denial of tenure. Thus, to allow any other subsequent time to constitute the time when this cause of action accrued is to disregard this

Court's holding in Kuberick and is in direct conflict with it. On the basis of these clear conflicts, Petitioners suggest that summary reversal of the decision of the Third Circuit in this matter is warranted.

DETERMINING WHETHER A CLAIM FOR ALLEGED NATIONAL ORIGIN DISCRIMINATION IS ACTIONABLE UNDER 42 U.S.C. §1981 CONCERNS THE RESOLUTION OF AN IMPORTANT FEDERAL QUESTION OF A RECURRING NATURE.

At no time from the initiation of Respondent's EEOC complaint through the filing of the complaint in this case, has Respondent made any allegations of racial discrimination. All of the facts alleged by Respondent have been designated and described as allegedly based upon national origin discrimination, see Petitioners' Appendix page 36a, n.10. Thus, only a national origin discrimination claim is

involved here. Hence, an accurate interpretation of Manzanares v. Safeway Stores, Inc., 593 F.2d 968 (10th Cir. 1979), leads inescapably to the conclusion that 42 U.S.C. §1981 affords a remedy only for racial discrimination, and does not afford this Respondent any relief.

Acceptance of the Respondent's contentions concerning Manzanares, however, would create a direct conflict in the Circuits concerning this issue. The District of Columbia Circuit has held that the statute does not afford relief for allegations of national origin discrimination, Kurlyas v. U.S. Department of Agriculture, 514 F.2d 894 (D.C. Cir. 1975) while Respondent maintains that Manzanares concludes that it does. It is quite clear that this conflict needs to be settled and determined by this Court.

CONCLUSION

For these reasons and those cited in the Petition, a Writ of Certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully Submitted,

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